MOTION FILED
APR 15 1977

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1219.

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

Petitioner,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN BAPTIST CHURCHES OF THE USA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

EARL W. TRENT, JR.,
House Counsel,
National Ministries,
American Baptist Churches,
Valley Forge, Pennsylvania. 19481
Attorney for Amicus Curiae.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
MOTION FOR LEAVE TO FILE BRIEF *Amicus Curiae*	ii
CERTIFICATE OF SERVICE	iv
TABLE OF AUTHORITIES	v
INTEREST OF THE *Amicus Curiae*	2
QUESTION TO WHICH THIS BRIEF IS ADDRESSED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	15
APPENDIX:	
Statements of the American Baptist Churches in the USA on the Principle of Separation of Church and State .	16

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The American Baptist Churches in the USA hereby respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner as provided in Rule 42 of the Rules of the Supreme Court of the United States. The petitioner has consented. One of the respondents, Alex V. Barbour, Regional Director of the Thirteenth Region, National Labor Relations Board, has consented by way of a letter dated March 29, 1977 from Wade H. McCree, Jr., the Solicitor General of the United States. In a letter dated March 29, 1977, Charles Orlove, Esquire, Counsel for respondent Lay Teachers Federation of the Gary Diocese, Local 3493, refused to consent stating as follows:

> "I find it necessary to refuse consent to your filing a brief of an *amicus curiae* by the American Baptist Churches in the subject case because this matter involves only a procedural question—whether the U. S. District Courts have jurisdiction to enjoin proceedings by the National Labor Relations Board with respect to private schools operated by a religious entity."

The American Baptist Churches in the USA, with national offices in Valley Forge, Pennsylvania, is one of the major protestant denominations in the United States.

The American Baptist Churches in the USA has a mandate from its General Board to speak whenever Baptist principles are involved, or are jeopardized through governmental action.

The issue posed in this case is basic to the Baptist principle of religious liberty.

This *amicus curiae* brief is an attempt to present to this court additional information based on Baptist ex-

perience in church-state matters. For numerous years prior to the enactment of the First Amendment to the Constitution of the United States, American Baptists expressed orally and in writing their views on the principle of religious liberty. We continue that practice today.

The attached brief is submitted in the hope that it will assist this Court in its deliberations.

For the foregoing reasons, the *amicus curiae* respectfully prays that this motion be granted.

Respectfully submitted,

EARL W. TRENT, JR.,
Attorney for the American Baptist Churches in the USA as Amicus Curiae.

CERTIFICATE OF SERVICE.

A copy of the foregoing Motion, together with brief *amicus curiae* attached, was served by mailing a copy to the petitioner's attorney, William B. Ball, 127 State Street, P. O. Box 1108, Harrisburg, Pa. 17108; and a copy of the foregoing Motion, together with brief *amicus curiae* attached, was served on respondent, Alex V. Barbour by mailing a copy to Wade H. McCree, Jr., Office of the Solicitor General, Washington, D. C. 20530, and to William Wachter, Assistant General Counsel, Special Litigation—National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570; and a copy of the foregoing Motion together with brief *amicus curiae* attached, was served on respondent, Lay Teachers Federation of the Gary Diocese, Local 3493, by mailing a copy to Charles Orlove, 201 North Wells Street, Suite 1900, Chicago, Illinois 60606, on this 15th day of April, 1977.

EARL W. TRENT, JR.,
Attorney for Amicus Curiae American Baptist Churches in the USA.

TABLE OF AUTHORITIES.

Cases:	Page
Califano v. Sanders, 45 U. S. L. W. 4209 (February 22, 1977)	13
Catholic Bishop of Chicago, 220 NLRB 359 (1975)	11
Caulfield v. Hirsh (E. D. Pa., Feb. 17, 1977, C. A. No. 76-276)	12
Edward G. Budd Mfg. Co. v. NLRB, 138 F. 2d 86 (3d Cir. 1943) cert. denied, 321 U. S. 778 (1944)	8
Everson v. Board of Education, 330 U. S. 1 (1947)	6
Fibreboard Paper Products Corp. v. NLRB, 379 U. S. 203 (1964)	9
Grutka v. Barbour, — F. 2d — (7th Cir., Feb. 2, 1977, Nos. 76-2129 and 76-2130)	4, 12
Johnson v. Robison, 415 U. S. 361 (1974)	13
Leedom v. Kyne, 358 U. S. 184 (1958)	10
Lemon v. Kurtzman, 403 U. S. 602 (1971)	7, 8, 9
Mathews v. Eldridge, 424 U. S. 319 (1976)	13
McColloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10 (1963)	11
NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1st Cir.) cert. denied, 346 U. S. 887 (1953)	9
Sherbert v. Verner, 374 U. S. 398 (1963)	7
Unelco Electronics Corp., 199 NLRB 1254 (1972)	8
Walz v. Tax Commission, 397 U. S. 664 (1970)	7
Weinberger v. Salfi, 422 U. S. 749 (1975)	13
Wisconsin v. Yoder, 406 U. S. 205 (1972)	7
United States Constitution:	
Amendment 1	*passim*
Statute:	
National Labor Relations Act, 29 U. S. C. § 141 et seq.	8, 9, 10
Miscellaneous:	
Baptists and the American Experience, Edited by James E. Wood, Jr. (Judson Press 1976)	6
Revised NLRB Standards for Asserting Jurisdiction, 42 LRRM 96 (1958)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1219.

ANDREW G. GRUTKA, as Bishop of the Catholic Diocese of Gary, Indiana,

Petitioner,

v.

ALEX V. BARBOUR, Regional Director of the Thirteenth Region, National Labor Relations Board,

and

LAY TEACHERS FEDERATION OF THE GARY DIOCESE, LOCAL 3493,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE AMERICAN BAPTIST CHURCHES OF THE USA AS AMICUS CURIAE.

The American Baptist Churches of the USA respectfully submits this brief as *Amicus Curiae* in support of the petition, filed by Andrew G. Grutka as Bishop of the Catholic Diocese of Gary, Indiana, praying that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 2, 1977.

INTEREST OF THE AMICUS CURIAE.

The American Baptist Churches in the USA is composed of four principal national agencies, and thirty-seven regional, city and state organizations in the United States, who represent more than six thousand congregations on matters pertaining to their relationship with the government of the United States of America, its agencies and departments as they affect our churches, administrative units and integrated and affiliated agencies engaged in Baptist mission activities.

Among Baptists religious liberty is a fundamental and sacred principle. Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. It is the opinion of the American Baptist Churches in the USA that the principle of religious liberty is jeopardized by the decision of the United States Court of Appeals for the Seventh Circuit dated February 2, 1977, which is on appeal in this case.

QUESTION TO WHICH THIS BRIEF IS ADDRESSED.

Does the First Amendment Religion Clauses guarantee churches a right to prompt access to courts of law to seek restraint against the assertion of governmental power over their religious mission?

STATEMENT OF THE CASE.

Bishop Andrew G. Grutka, the Petitioner,[1] is governing head of the Roman Catholic Diocese of Gary, Indiana, and is charged by the law of his Church with ultimate responsibility, both spiritual and temporal, for the Catholic schools of the diocese. On September 16, 1976, the Bishop filed a complaint against the National Labor Relations Board,[2] seeking a preliminary and permanent injunction against application of the National Labor Relations Act to those schools and thus to restrain NLRB from further asserting jurisdiction over, or taking any action with respect to, Catholic schools, or teachers therein, of the Diocese of Gary and from holding an election which NLRB had ordered for October 7, 1976, for the lay teachers in those Catholic schools. The complaint also sought to enjoin NLRB's proceeding further under the Act in prosecuting an unfair labor practice charge against the Bishop. Finally, the complaint sought a declaratory judgment that the National Labor Relations Act is unconstitutional as applied to the said Catholic schools which are an integral part of the religious mission of the Catholic Church.

On September 24, 1976, the Bishop filed a Motion for Temporary Restraining Order to enjoin application of the Act to the schools on the ground of immediate and irreparable injury caused to him thereby through violation of his rights under the Religion Clauses of the First Amendment and under the Fifth and Ninth Amendments to the Constitution of the United States. To this Motion was appended the affidavit of F. Raymond Fowerbaugh, which affidavit included verification of the allegations of the complaint as well as specification of facts believed to constitute irreparable harm.

On September 30, 1976, NLRB filed a Motion to Dismiss for lack of subject matter jurisdiction or alternatively

1. Hereinafter also referred to as "the Bishop."
2. Hereinafter referred to as "NLRB", or "the Labor Board."

for summary judgment. On October 5, 1976, the District Court, after hearing, issued a preliminary injunction enjoining all further action [3] by NLRB in exercising its jurisdiction. The Court held the Bishop's challenge not frivolous but as involving "fundamental Constitutional issues" of great magnitude and of far-reaching importance.

Thereafter NLRB and the Respondent Union appealed to the United States Court of Appeals for the Seventh Circuit. Oral argument took place on January 21, 1977, and on February 2, 1977, the Court of Appeals vacated the preliminary injunction on the ground that the District Court lacked subject matter jurisdiction. The principal reasons stated by the Court of Appeals for its decision were (a) that "developing a factual record in labor disputes is a task peculiarly within the competence of the Board", and (b) that "the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." [4]

On February 11, 1977, pursuant to the mandate of the Court of Appeals, the ballots which had been cast in the October 7, 1976, election were counted, the majority of the teachers rejecting the Union as their bargaining representative. Objections to the Election were filed by the Union with NLRB February 15, 1977, thus extending the representation proceedings. Proceedings in the unfair labor practice charge case have been scheduled to resume March 7, 1977. In the face of the resumption of the exercise of NLRB jurisdiction over his schools, the Petitioner, on February 22, 1977, applied to Mr. Justice Stevens for a stay in enforcement of the judgment and mandate of the Court of Appeals pending the filing of a Petition for Certiorari and disposition of that Petition by this Court.

3. The District Court permitted the scheduled election to take place, the ballots, however, to be impounded uncounted.

4. *Grutka v. Barbour,* – F. 2d – (7th Cir., Feb. 2, 1977, Nos. 76-2129 and 76-2130).

ARGUMENT.

The Supreme Court should grant certiorari because the question presented in this Petition is of first impression nationally and affects the rights of all churches and associations of churches in this country. Immediate access to judicial review in all substantive matters raising First Amendment concerns of churches and religious organizations is a singularly important issue to Baptists today. We are alarmed at the degree to which government administrative agencies have involved themselves in the internal affairs of churches, most of which is occurring without the slightest legislative authority. Although the religious community can effectively resist legislative attempts to exercise authority over the religious mission of churches, we are without recourse when an administrative agency unilaterally usurps such authority. We feel that the integrity of both church mission activity and government's administrative functions are preserved where conflicts are accorded early judicial review.

The constant threat of government intrusion free of immediate judicial review into the affairs of churches has a chilling effect on volunteers who plan and implement activities in pursuit of their religious mission. Many religious organizations must now function in an atmosphere of uncertainty with respect to their rights while attempting to pursue fund raising and program activities.

We have learned through experience that immediate judicial relief against encroachments of government into church affairs is essential to avoid the consequences of a panoply of other governmental regulatory agency actions. These kinds of agency actions amount to an indirect tax on churches who must face the burdens and costs set by the government while undergoing administrative proceedings. We are too often frustrated by the diversion of our limited

resources and time from primary mission responsibilities to compliance with governmental demands of agencies who lack competence in the area of First Amendment concerns of churches. Baptists believe that the church is irreparably harmed and religious liberty is abridged when government without prior judicial review can assert control over its religious mission through investigations, interrogations, and the use of government's full weaponry of summonses, subpoenas and hearings to accomplish the ends of administrative agencies.

Religious liberty is so fundamental to Baptist beliefs that the protection of these First Amendment rights is preeminent among matters of great public concern to us. The Baptist sect was in large part formed in reaction to the oppressive conditions of a state church. Early Baptist experiences have taught us the wisdom of keeping the functions of church and state separate. This experience inspired Baptist to make a distinct and notable contribution to the enactment of the First Amendment to the Constitution, whose religion clauses have been described as America's greatest contribution to world civilization.[5]

The "Wall of Separation" a metaphor used by Roger Williams, an early Baptist and founder of Rhode Island Colony, and a century and a half later by Thomas Jefferson in expressing his views on the desired relationship between church and state (See *Everson v. Board of Education*, 330 U. S. 1, 18 (1947)), still epitomizes Baptist views on this subject today. Baptist have historically been vigilant in efforts to keep the wall impregnable.

We feel there should be no limitation on access to a district court by churches seeking a review of governmental action which jeopardizes the principle of separation of church and state. Prompt access to judicial review is

5. Baptists and the American Experience, edited by James E. Wood, Jr. p. 20 (1976).

essential if we are to avoid the kinds of "confrontations and conflicts" between government and churches warned of in *Walz v. Tax Commission*, 397 U. S. 664 at 674 (1970).

A district court can immediately determine at minimum expense to both the church and the government whether there exists a "compelling state interest" justifying a limit to religious liberty. This court in *Sherbert v. Verner*, 374 U. S. 378 (1963) stated:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area,—'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* at 406.

The conduct complained of must have ". . . posed some substantial threat to public safety, peace or order." *Id.* at 403. This Court further stated in *Wisconsin v. Yoder*, 406 U. S. 205 (1972) government must claim either that it does not deny the free exercise of religion, or that there is "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 124.

It is obvious that the government cannot show an interest of sufficient magnitude to override the Bishop's rights to ultimate authority in the Catholic schools in his diocese. By asserting jurisdiction over the parochial school system operated by the Catholic Church, the NLRB has involved the federal government in the affairs of that Church in violation of both the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause forbids "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U. S. 602, 613 (1971); *Walz v. Tax Commission, supra* at 674.

The importance of preserving the separation of church and state is such that government action has been scrutinized to guard against even the "potential" for such entanglement. *Lemon v. Kurtzman, supra* at 618. Excessive government entanglement with the religious affairs of the Catholic schools is the inevitable result of the Board's assertion of jurisdiction over those schools.

A brief survey of the role of the NLRB in the supervision of labor-management relations reveals the extent of the inevitable entanglement. Initially, to determine whether the Board's jurisdictional standards are met, the employer must be questioned concerning the dollar volumes of its business. See generally, *Revised NLRB Standards for Asserting Jurisdiction*, 42 LRRM 96 (1958). In the case of a church, this would presumably involve such matters as the amounts received in the collection plate. The Board may also be called upon to determine appropriate bargaining units, National Labor Relations Act § 9(b); 29 U. S. C. § 159(b). To do so, the Board must investigate such matters as the duties and skills of the employees involved, and the organizational structure of the employer. *Unelco Electronics Corp.*, 199 N. L. R. B. 1254 (1972). During the course of a union organizing campaign, the NLRB may be called upon to determine whether church leaders have committed unfair labor practices such as discharging teachers for supporting the union. National Labor Relations Act § 8(a)(3); 29 U. S. C. § 158(a)(3). In the parochial school context, the Board might be required to determine whether a nun or priest discharged an employee for engaging in union activity or for some neutral "business" reason such as failure to teach certain religious principles. See generally, *Edward G. Budd Mfg. Co. v. NLRB*, 138 F. 2d 86 (3d Cir. 1943) cert. denied, 321 U. S. 778 (1944). Should a union be certified as bargaining agent for the employees of a religious organization, the NLRB would ensure that the church bargained "in good faith." National Labor Relations Act §§ 8(a)(5), 8(d); 29 U. S. C. §§ 158(a)(5), 158(d). In addition to judging the subjective good faith of the religious leaders who are bargaining with the union, *NLRB v. Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1st Cir.) cert. denied, 346 U. S. 887 (1953), the Board would decide what subjects are included within the scope of the duty to bargain. The church would be required to bargain concerning "terms and conditions of employment." See generally, *Fibreboard Paper Products Corp. v. NLRB*, 379 U. S. 203 (1964). Thus, at the insistence of the union, the Board could be called upon to decide whether, for example, the curriculum of a parochial school is a "mandatory subject of bargaining."[6]

As this brief survey demonstrates, the NLRB, in performing its proper role, will be called upon to investigate the organization of the diocese and the decisions of church leaders. In doing so, the Board will touch upon many matters of religious concern. "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Lemon v. Kurtzman* at 620.

The NLRB also interferes with the "free exercise" of religion in the Catholic schools when it provides support for a union organizing teachers. A union which is recognized as a result of an NLRB election will likely demand changes in the decision-making process in such matters as the discharge of teachers. Decision over such matters as to whether a teacher may be discharged for his religious beliefs may become a subject for grievance and arbitration rather than unilateral decision. The church is, of course,

6. As the Court noted in *Lemon v. Kurtzman, supra*, the teaching of secular subjects often becomes intertwined with the teaching of religion. 403 U. S. at 618-619.

free to surrender such decision-making power if it chooses to do so. Constitutional issues are raised only because the impetus for the surrender is provided by a government agency.

The Court has recognized an exception to the usual review requirements in two important cases. In *Leedom v. Kyne,* 358 U. S. 184 (1958), the Court held that a Federal District Court has jurisdiction to issue an injunction to restrain the Board from certifying a bargaining unit containing professional and non-professional employees, contrary to § 9(b)(1) of the National Labor Relations Act. 29 U. S. C. § 159(b)(1). The Court stated that the Board "deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." 358 U. S. at 189. If the district courts have jurisdiction to prevent the deprivation of a right granted by Congress, then it follows that the district courts must have jurisdiction to prevent the deprivation of a right guaranteed by the Constitution of the United States.

Leedom v. Kyne contains, of course, language designed to narrowly limit the scope of its holding. Application of the rule of *Kyne* to a case where the Board asserts jurisdiction contrary to the Constitution would not result in any enlargement of that rule. The Court stated initially in *Kyne* that the question presented concerned, not the jurisdiction of the district courts to vacate a determination of the Board involving an error of law, but only one "made in excess of its powers." 358 U. S. at 185. Surely a decision of the Board to exercise power denied it by the Constitution is "made in excess of its powers."

The Court in *Kyne* also limited its holding by pointing out that the Board had acted "contrary to a specific prohibition in the Act." 358 U. S. at 188. Here we are not

concerned with any specific prohibition contained in the Labor Management Relations Act (the Act). Here we are concerned with an exercise of power by the Board beyond any contemplated by the framers of the Act.[7]

The Board has sharply departed from this limitation to "purely commercial activities" by its current practice of asserting jurisdiction over schools which are not "completely religious" in nature. *Catholic Bishop of Chicago,* 220 NLRB 359 (1975). If a court may enjoin the Board from asserting powers specifically forbidden by Congress, it must also have jurisdiction to enjoin the Board from exercising power in a manner so unforeseen that Congress did not feel it necessary to write a specific prohibition into the law.[8]

The Court has on one occasion held that a district court may enjoin the Board from exercising powers not granted by Congress even in the absence of any specific provision forbidding that exercise of power. *McColloch v. Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963). There, the Court held that a district court could enjoin the NLRB from asserting jurisdiction over ships owned by foreign subsidiaries of a United States Corporation which fly the flag of a foreign nation. No

7. When the National Labor Relations Act was amended by the Taft-Hartley Act in 1947, the House proposed an amendment to the definition of an employer which would have excluded all religious organizations. 1947 H. R. 3020. This amendment was eliminated by the Conference Committee because "only in exceptional circumstances and in connection with *purely commercial* activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act." Committee of Conference, House Report No. 510, June 3, 1947; 1947 U. S. Code Congressional Service 1135, 1137.

8. This reading of the legislative history is strengthened by the well-known principle of statutory construction that the Court will construe a statute to avoid constitutional issues if such a reading of the statute is reasonable.

specific provisions of the Act were offended. The Court nevertheless stated that it was not extending the *Leedom v. Kyne* exception to the ordinary review procedures. Rather, the Court stated that an injunction could issue because of "the presence of public questions particularly high in the scale of our national interest . . ." 372 U. S. at 17. In that case, the important issues involved foreign affairs. We submit that the principle of separation of church and state enshrined in the First Amendment is of an importance equal to the relations of the United States to the nation of Honduras.

Faced with these arguments, we think the Court of Appeals erred by holding that the diocese should be required to exhaust the NLRB proceedings in order to create a full factual record against which the "entanglement" issue could be judged. *Grutka v. Barbour*, – F. 2d – (7th Cir., Feb. 2, 1977, Nos. 76-2129 and 76-2130). The obvious fallacy of this argument is that the question of whether excessive entanglement will result from the NLRB's assertion of jurisdiction is not a labor question. The issue is whether excessive entanglement between the Board and the Catholic Church will result from the Board's contacts with the Church. The Board has no special experience or competence to make such a determination. Indeed, one may question the ability of the Board to neutrally evaluate its own entanglement with the church. As the court stated in *Caulfield v. Hirsch* (E. D. Pa., Feb. 17, 1977, C. A. No. 76-276), "This is not a labor case but a First Amendment case."

This Court has recognized in other contexts that a challenge to the constitutionality of the actions of an administrative agency is fundamentally different from a challenge based on factual or statutory grounds. Thus, this Court held that 38 U. S. C. § 211(a), which bars judicial review of decisions of the Administrator of Veterans' Affairs, does not apply to cases where his decision is challenged on constitutional grounds. *Johnson v. Robison*, 415 U. S. 361 (1974). This Court interpreted the statute so as to avoid the constitutional problems which would be raised by a statute which foreclosed judicial review of the constitutionality of government action. In the instant case, Petitioners will ultimately be able to obtain judicial review by committing an unfair labor practice. Requiring Petitioners to do so, however, would result in unconstitutional entanglement of the church with the NLRB during the lengthy administrative proceedings involved.

Similarly, this Court has also held that § 205(g) [9] of the Social Security Act does not foreclose judicial determination of constitutional challenges to decisions of the Secretary of HEW. *Weinberger v. Salfi*, 422 U. S. 749 (1975); *Mathews v. Eldridge*, 424 U. S. 319 (1976). In explaining those decisions, this Court stated:

> Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. . . . [T]hose cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence. [citations omitted]. *Califano v. Sanders*, 45 U. S. L. W. 4209, 4211 (February 23, 1977).

There is no reason to believe that NLRB hearing procedures are any better suited to the resolution of consti-

9. 42 U. S. C. § 405(g).

tutional issues than HEW hearing procedures. Therefore, the same presumption of the "availability of judicial review" should be operative in the instant case.

There is one final reason why a religious organization should not be placed in the position of having to commit an unfair labor practice in order to challenge the Board's jurisdiction. Most religious organizations have played an important role in fostering respect for our government and its democratic institutions. It would be anomalous at best for this Court to place such institutions in the position of having to disobey an order of an agency of the federal government in order to vindicate a constitutional right when the alternative of following the orderly process for seeking an injunction is readily available.

CONCLUSION.

We conclude by urging this Court to grant certiorari because of the importance of the issue raised to all churches. The exercise of jurisdiction by the NLRB over the Catholic schools will result in excessive entanglement of the Board with the church. This entanglement is the inevitable result of the Board's supervision of the labor relations practices in these religious schools. In order to preserve the right of a church to pursue its religious mission free of government interference, some effective judicial relief must be made available to a church before the NLRB or any similar governmental administrative agency devoid of expertise in religious matters becomes involved in church affairs. We submit that a district court injunction is the only such effective judicial relief available and acceptable to churches.

Respectfully submitted,

EARL W. TRENT, JR.,
House Counsel,
National Ministries,
American Baptist Churches,
Attorney for Amicus Curiae.

APPENDIX.

RELIGIOUS LIBERTY

WHEREAS, We as American Baptists have seen anew the significance and necessity of the principles of religious freedom and the separation of Church and State which our forefathers first proclaimed and practiced in this land; and

WHEREAS, We believe that the time has now come, at this mid-century, to restate and to reaffirm those basic principles for both the welfare of our nation and for the freedom of the world; therefore, be it

Resolved, That we as American Baptists reaffirm at this mid-century our support of the following principles: (a) religious liberty for all people everywhere; (b) the right of every person to hold whatsoever religious beliefs his conscience may dictate; (c) freedom of the press, freedom of speech, freedom of assembly; and (d) the absolute separation of Church and State. Furthermore, be it

Resolved, That in fulfilling our own principles of freedom we actively support such human rights and fundamental freedoms as are expressed in the Universal Declaration of Human Rights of the United Nations.

Adopted by the American Baptist Churches—May 1950

SEPARATION OF CHURCH AND STATE

WHEREAS, there are increasing encroachments upon the time-honored American principle of the separation of church and state, and

WHEREAS, freedom of religion is not recognized in countries where Protestantism is not strong; therefore, be it

Resolved, that we go on record as deploring all religious oppression anywhere, whether by state or church, and that we urge our Baptist people to be alert and vigorous in preserving and promoting religious freedom and the separation of church and state.

Adopted by the American Baptist Churches—1951

RELATIONS BETWEEN CHURCH AND STATE

Recognizing that Baptists have historically resisted any involvement of the process of the state over the affairs of the church, and of their equal concern that no church or churches shall exercise control over public institutions which are designed to serve the needs of the citizens generally, be it resolved:

a. That American Baptist churches and related institutions, in cooperation with the Division of Christian Social Concern, review their present policies and practices with reference to the principles of freedom and responsible participation in the life of the nation.

b. That American Baptists reaffirm their traditional commitment to a local and state controlled system of free and equal elementary and secondary public education for all citizens irrespective of race or religion, and that we oppose any effort to undermine its effectiveness or limit its benefits.

c. We recognize the right of churches and other organizations and groups to establish private schools in the interest of spiritual, moral or other objectives which they believe cannot be accomplished satisfactorily within the framework of the public school system. We insist, however, that the support of such private schools is solely the responsibility of their respective constituencies and is in no

way a public obligation. We urge all Baptists, therefore, to resist all attempts to obtain public funds for the support of private elementary and secondary schools, whether by direct appropriation, through the provision of auxiliary services and benefits, or granting of local tax exemptions or credits.

Adopted by the American Baptist Churches—1963